Germany’s Failing Court

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Commentaries to the German Federal Constitutional Court’s unprecedented judgment in Weiss (2 BvR 859/15 and others of 5 May 2020) are likely to focus on the German court’s argument on proportionality (see e.g. the very helpful comment by Tony Marzal). As is well known by now, the German court criticised the Court of Justice and refused to follow its judgment in Case C-493/17 Weiss of 11 December 2018, for failing to apply the German version of proportionality and for not fully ‘balancing’ economic arguments. In European Union law, however, this kind of review does not normally take place. In cases of a challenge to the legal basis of an EU competence and where no individual rights or fundamental freedoms are involved, the CJEU normally limits its review to something closer to an English-style ‘rationality’ review, which looks at manifestly inappropriate objectives and measures.

Remarkably, the German Court was fully aware of this fact: it cited thirty sixdifferent judgments of the CJEU at par. 126. They make clear the differences between the German and EU conceptions of proportionality.. Nevertheless, rather than accept that proportionality applies in a different way in Luxembourg, the German Court demanded that the CJEU – and by extension all other jurisdictions of the EU – adopt the Germansense as the only ‘methodologically’ acceptable (par. 156).

This would be enough to reject this judgment as illegitimate and wrong. It is not open to the German court or any other national court to impose its own administrative law to the other members. This is why we have created the Court of Justice of the European Union, to reach a common view on matters of EU law. The very idea that a state of the EU would seek to impose its own rules on all others in defiance of its treaty obligations, is simply repugnant to the rule of law and contrary to what the member states have agreed. So when the German judges required the ECB, which was not (and could not be) a defendant in this case, to re-issue its Decision on PSPP ‘within three months’, and called the CJEU’s judgment ‘not comprehensible’ (at par. 116) and ‘objectively arbitrary’ (par. 118) and treated it as if it were non-existent, they committed an unprecedented act of legal vandalism.

My focus here, however, is not on this aspect of the case, but on something that makes the case even more alarming. What were the constitutional principles that made such a judgment possible? Most European jurisdictions recognize the primacy of EU law in the following sense: They say that the European Court of Justice has the exclusive task of interpreting EU law, so that the Court of Justice must have the last word on matters relating to the EU Treaties. States accept the primacy of EU law through an understanding of the required division of labour among courts and through a principle of ‘institutional tolerance’ (I explain this in detail in my recent book on the legal nature of the EU, Eleftheriadis, A Union Peoples, OUP, 2020, ch. 4).

Until recently this was the case in Germany under the Honeywell judgment of 2010, which reserved an ‘ultra vires’ review only on what we could loosely call

‘constitutional essentials’. It seems that this judgment is no more. In *Weiss* the German Constitutional Court says that even the smallest or a merely procedural failure of the CJEU to effectively monitor the EU’s competences can be ‘structurally signficant’ form a ‘constitutional’ point of view. Why is this so? I will try to explain this here as briefly as I can, although I accept that this important question requires a fuller treatment.

My answer is that the German Court has taken a surprising and ultimately illegitimate turn towards a narrow and inward interpretation of its constitution, which inexplicably neglects its European dimension. The Court has restated its own principles, on the basis of a set of surprising and ultimately indefensible doctrines. This is not just a domestic debate. Given the potential effects of Germany’s apparent defiance of EU law and in light of the current ongoing discussions about the desired increased burden-sharing among the winners and losers of the Eurozone (something on which I have written here and here), the internal constitutional argument in Germany is a matter of great significance for the future of the Eurozone.

Three Strange Principles

The German Court’s judgment depends on three intricate principles that the Court says are implicit in the German constitution, to such an extent that they are ‘unamendable’ under the ‘eternity’ clause of Article 79. These are unique to Germany and unfamiliar in other European jurisdictions. These are (i) the principle of ‘constitutional identity’, (ii) the principle of the ‘right to vote as a part of sovereignty’ and (iii) the principle of ‘budgetary sovereignty or autonomy’.

These principles originate in some doctrines developed by the Court over the last thirty years, starting with the *Maastricht* judgment and especially through the *Lisbon* judgment of 2009, but as I will show they have acquired an entirely new meaning since the Eurozone crisis. In their newest manifestation in *Weiss*, these principles are the cause of the confrontation with EU law. It is important to note that these doctrines are not derived from the main ideas that we find in constitutionalism’s liberal and democratic canon. This canon, as we see it in the US, Canada, Britain, France, Belgium, Netherlands, Greece and other parliamentary democracies, allows for the harmonious cooperation of sovereign states for the purpose of ‘managing their interdependence’ (to borrow a key term used by Stephen Weatherill in his Law and Values in the EU, OUP, 2016).

The new German principles are hostile to managing interdependence. They adopt a strangely inward account of constitutional law that departs form constitutional interpretation as we see it in other democracies. As I will show below (and as I argued in more detail here, when the first such arguments emerged), the German principles originate instead in Carl Schmitt’s dark musings about ‘popular sovereignty’ (on which see Lars Vinx’ illuminating analysis here). They tie the German Constitution to an ideal of the collective self-expression of the German people that sees anyexternal legal obligation as a threat. #hese Schmittian principles confuse the sharing of power with the loss of sovereignty and to that extent contradict the European dimension of the German Basic Law.

The Doctrine of constitutional 'Identity'

The first such principle is the principle of the protection of the 'constitutional identity' of Germany as an independent state. It is set out in *Weiss* as a matter linked to the 'eternity' clause of the German constitution::

'*The democratic legitimation by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law's constitutional identity protected in Art. 79(3) GG; it is therefore beyond the reach of European integration in accordance with Art. 23(1) third sentence in conjunction with Art. 79(3) GG'* (par. 101)

That a constitution limits how much power may be delegated to an international body is, in principle, a very good point. Imagine if the European Union successfully claimed plenary legislative power. It would follow that Germany's political institutions would have lost their power to decide political matters for themselves. German political structures would thus be a deception. There would be a legislature without legislation. So there are limits to international cooperation: no transfer of power could lawfully turn our parliament into a joke.

This argument, however, applies only to important constitutional transformations, not to any error supposedly committed by an international body to which we have delegated powers. Without tolerating such errors, no delegation is possible anywhere Indeed, in Honeywell (2 BvR 2661.06 of 06.07.2010) the German Constitutional Court explained that under the *Maastricht* and *Lisbon* judgments the German Courts would exercise an *ultra vires* review only in cases 'of manifest transgressions of competence' or 'on the basis of the exercise of competence in the area of constitutional identity' (par 55). It reserved therefore the *ultra vires* review for manifest failures and for what we might call violations of constitutional fundamentals.

This point is put in a much simpler way by other jurisdictions. They say that accession to the EU, even when it takes place through a constitutional amendment, is not supposed to undermine the pre-existing general architecture of the constitution. This is an entirely uncontroversial point, which arises just from the *systematic* nature of constitutional law. One does not need any deep theory about the state's 'identity' to make it. In this way the United Kingdom Supreme Court, for example, ruled in its HS2 judgment in 2014 that the European Communities Act 1972 as a 'constitutional statute' enjoyed a certain primacy over other acts, but had not abolished all other 'constitutional instruments' of the British Constitution, which remain valid and equally overriding.

The German Court has transformed this obvious principle of coherence into an entirely different idea of the inherent value of the self-expressionof the German people. So, the court says that'the democratic legitimation by the people of public authority… belongs to the essential contents of the principle of the sovereignty of the people' (par. 101). This is not an innocence exaggeration, because the constitution is hereby transformed into something other than the totality of the procedures and

principles included in the text and in the practices of officials and courts, which naturally includes its transnational and European dimensions. The subject matter of ‘constitutional identity’ is not a set of rules but only the unidentified object of a supposed German ‘people’supposedly in control of ‘popular sovereignty’. The constitutional transfer of sovereign powers to the EU by virtue of Article 23 of the Basic Law becomes an insignificant footnote. It follows that even the smallest transgression of EU competences will deprive the German people from its inherent powers and is a threat to ‘constitutional identity’.

The Doctrine of the Right to Vote

The second strange doctrine of the German constitutional court is the right to vote, as it relates to the shape of the German Republic. Again, in principle the right to vote is a good and simple principle of constitutional law. But in the hands of the German Constitutional Court in *Weiss*, it acquires an almost mystical content connecting it to the inherent power of the people. This doctrine means that any possible contravention of the division of powers between the EU and the member states is also an immediate violation of the individual right to vote of all German citizens under Article 38 of the German Constitution. This is so even though the competence at issue may have nothing to do with voting or a free and fair election.

The argument has an important procedural dimension, which we should not lose sight of. Citizens have standing before the German Constitutional Court only if they claim that one of their ‘basic rights’ has been violated. Since the Eurosceptic politicians that have brought the *Gauweiler* and *Weiss* challenges cannot show any other loss or violation that they have suffered by the challenged omissions of the German Government, Article 38 and the right to vote is the only procedural avenue they can use to gain access to the court. Unless this argument succeeds, these cases would have been thrown out as inadmissible.

How is the right to vote connected to the precise allocation of competences? The Court states that the right to vote requires that citizens be subject to such public authority ‘as they can legitimate and influence’ (par. 99). The Court explains that the right to vote is not merely a liberty or power to choose from available options in free and fair elections (which is what the right to vote means in other European states) but the entirely different right to *effectively influence* the outcome of the political process. So the Court states that the right to vote protects individuals against ‘a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union’ (par.98). If the EU usurps powers from the state, it leaves fewer powers for the voters to share. It follows that any transgression by the EU of its competences takes away a small but significant amount of power from each voter. In other words, each voter in the Court’s view has a piece of ‘sovereign power’ to influence the Bundestag, so that any curtailment of the powers of the Bundestag is at the same time a reduction in the amount of sovereignty possessed of each voter at the moment of election.

This is an obviously false doctrine. No voter has a piece of sovereignty, which is to be used in an election. Our votes are never guaranteed any influence at

all. The value of voting does not derive form the amount of influence it secures. Voters in the German Eurosceptic party AfD, for example (a former leader of which was among the claimants in *Weiss*), have no influence over the current German government. This is because they are not that many of them. The party received just 12% in the 2017 German election. They are a minority and therefore remain in opposition. So the party's voters have today *zero* influence over government, not 12% influence. Yet, no rights of theirs are violated. This is how parliamentary democracy is supposed to work. The Constitutional Court is thus entirely wrong about the value of voting and its supposed immediate reduction by the transgression of EU competences.

The German Constitutional Court's argument in effect assumes that under Article 38 all voters are entitled *to influence* government. This seems to be the meaning they give to the idea of voting as holding 'sovereign power' (para. 103). Yet, voters do not have such a right. Voters elect representatives and the representatives of the majority in parliament set up a government. But only the majority rules. The minority stays in opposition. It seems to me that in the eyes of the German Constitutional Court this must be an unconstitutional violation of the right to vote, for those who voted for the opposition are excluded from exercising their 'share of power' and are thus deprived of their share of 'popular sovereignty'. It is an absurd idea. To lose influence is not to lose your right to vote.

The Court's interpretation of the right to vote is paradoxical for another reason. The Court states that the principle entails that citizens can only be 'subjected to such public authority as they can legitimate and influence', so that 'any act of public authority exercised in Germany can be traced back to its citizens' (para. 99). So the principle 'prohibits subjecting citizens to a political authority they cannot escape and in regard of which they cannot in principle influence, on free and equal terms, decisions on the persons in power and on substantive issues' (par. 99). This would mean that all courts in Germany are unconstitutional. Judicial power (including the power of the German Constitutional Court, by the way) must be 'illegitimate' and contrary to popular sovereignty, since it cannot be 'influenced' by the electorate 'on free and equal terms'. There is evident confusion here between politicallegitimacy and democraticlegitimacy. Political legitimacy rests on elections. Democratic legitimacy rests on other forms of accountability as well. This erroneous argument about democracy is at the heart of the Court's resistance to the EU.

The Principle of Budgetary Sovereignty

This takes us to the third idiosyncratic doctrine of the Constitutional Court. It is the doctrine of 'budgetary sovereignty' or 'budgetary autonomy', which is intimately connected to the Article 38 argument. The Court believes that the German Parliament must have complete controlover all 'financial matters' that concern the state. It cannot share decision making powers with foreigners and it cannot share risks with them. This doctrine is stated in *Weiss* as follows:

'Art. 38(1) first sentence, Art. 20(1) and (2) and Art. 79(3) GG protect, in particular, the budgetary powers of the German Bundestag … and its overall budgetary

responsibility as indispensable elements of the constitutional principle of democracy … It is for the German Bundestag, as the organ directly accountable to the people, to take all essential decisions on revenue and expenditure; this prerogative forms part of the core of Art. 20(1) and (2) GG, which is beyond the reach of constitutional amendment' (par. 104).

This is in my view the strangest of the doctrines of the German Constitutional Court, for it directly contradicts the very idea of the European Union.

As is well known the European Union's main principle is that states should share economic decision-making with one another. They do so either through the Treaties, and the freedoms established there, or through secondary law. This is the basis of the single market. For example, the free movement of goods, services, persons and capital exposes all member states to economic uncertainties that are caused by the free and uncontrolled movement of goods, persons and capital. Nobody really knows how many migrant workers may turn up on any given years, or how many of your businesses are going to go bankrupt because of effective foreign competition. The Union is based on these shared risks and the associated transfers of wealth from one country to another. But this is how it should be. The EU member states joined willingly, having considered that the benefits of openness in the single market – economic, political and ethical – outweighed the costs. This is even more clearly so in the case of the EMU, where the members of the Eurozone have decided to give up something extremely valuable to them, namely their monetary and exchange rate policies. All states are now exposed to the decisions of the ECB which they cannot fully control, although they are being represented in its Governing Council. They have made a democratic decision to share economic and fiscal powers on the basis of shared laws. This the whole point of the European Union.

How then did Germany join the EMU?Is not the very idea of monetary union a violation of 'budgetary sovereignty'? The answer is that this doctrine did not exist at the time Germany joined. It is an entirely new doctrine, which was created in response to the Eurozone crisis, when the possibility arose that Germany might have to assist states that were burdened by the Eurozone's flawed initial design. This doctrine was not there at all at *Maastricht.* The *Weiss* judgment cites only the Lisbon judgment as the original statement of the principle, but the principle there was something entirely different. In Lisbon (BVerfGE 123, at par. 256) the Court stated that not every European obligation that has an effect on the budget endangers the viability of the Bundestag as an effective legislature. The Court said that the Bundestag needs only 'overall responsibility':

'The openness to legal and social order and to European integration which the Basic Law calls for, include an adaptation to parameters laid down and commitments made, which the legislature responsible for approving the budget must include in its own planning as factors which it cannot itself directly influence*. What is decisive, however, is that the overall responsibility, with sufficient political discretion regarding revenue and expenditure, can still rest with the German Bundestag' (Lisbon* judgment*,* par. 256, emphasis added*)*

That was in 2009, at a time of openness.Today the Court takes the directly opposite view. It says, in effect, that all essential fiscal decisions must be controlled by the Bundestag, even if the Treaties have committed Germany to a monetary union with other states. This is by far the most baffling doctrine of the German Constitutional Court, because it is against the very idea of being a member of the Eurozone. How do you control the budget if you have no control over the currency in which it is written? If this principle means anything at all, it must surely entail that Germany's participation in the Eurozone is unconstitutional. The Court does not say that, however. Instead, it uses this principle selectively as a big stick with which to hit the politicians. It is an infinitely open-ended principle that permits the Court to interfere with public policy at will. This is no constitutional principle..

The Principles at Work

How were these principles applied in *Weiss*? Summarised briefly, the three principles were applied in the following ways.

First, the principle of 'constitutional identity' is not technically being violated by the bond buying programme (par. 116, and par 227). However, the idea of constitutional identity enters into the idea of the review of EU's actions, through another ground the Court considers, which it calls 'scope of European integration'. Here constitutional identity is mentioned as one dimension of the required assessment by the Court (at par. 101). So the alleged failures of the Court of Justice are presented as legally unacceptable in Germany because they 'manifestly exceed the judicial mandate conferred upon the CJEU … and result in a structurally significant shift in the order of competences to the detriment of the Member States' (par. 154, see also 157, 158). The same failure is evident in the ECB whose decision constituties a 'violation of the principle of proportionality' which is 'structurally significant so that the actions of the ECB constitute an *ultra vires* act' (par. 166) and also violate the principle of proportionality (par. 167). The test of 'structurally significant' failures of EU law can only be understood, I believe, against the background of the theory of constitutional identity, because they only structure that matters in this argument must be the presumed 'deeper structure' of the constitution, which is to be understood through 'popular sovereignty'.

Second, the Court found that the 'right to vote' was also violated because the failures of the ECB and the CJEU resulted in a 'structurally significant shift in the order of competences to the detriment of the Member States' (par. 157) and because any violation of the division of competences is immediately a violation of the right to vote (see for example par. 116, 143, and 154-158).

It appears that the third principle, 'budgetary autonomy' was not directly violated. The bond buying programme did not provide for 'risk sharing' among member states and thus did not affect the 'budgetary responsibility of the Bundestag' (par. 227). The principle plays a major role in the judgment, though, through another route, namely its role in the required proportionality review. The main reason why the proportionality review of the CJEU was inadequate from the German point of view was that it did not consider the potential 'losses' of the PSPP bond buying

programme. One of the losses was precisely to the ‘budgetary autonomy’ of the states, as the Court explains:

‘In that regard the CJEU does not make it clear which opposing interests these two safeguards serve; objectively it can be assumed that they serve the budgetary autonomy of Member States and thus promote fiscal policy interests, which do not fall within the ambit of monetary policy, as follows from Art. 126 TFEU. However, it appears that other opposing interests are not taken into consideration’ (par. 132, emphasis added).

In this respect, the idea of ‘budgetary autonomy’ is at the heart of the case, for the failure of the CJEU to meet the proportionality test was based precisely on the construct of ‘losses’ to that ‘budgetary autonomy’ is idea.

This is so even though the court has arrived, by a long and tortuous argument, to the conclusions that the ECB (and the CJEU) did not, after all, violate Article 123 TFEU so that ‘it follows from an overall balancing that a manifest violation of Art. 123(1) TFEU is not ascertainable’ (para. 180). But having just said that, the court says ten paragraphs below that because of the failure of ‘proportionality’ the CJEU ‘allows the ESCB to conduct economic policy’ (par 133).

So the case turns on the application of these three unfamiliar principles. It is equally important to stress, however, that these are relatively *new* principles. They were not part of the standard analysis of EU law by the German Constitutional Court in the *Maastricht* and *Libson* judgments. Under the old principles, the applicants’ claims in *Weiss* would have been found either inadmissible or unfounded. The judgment in *Weiss* is based on the precisely opposite theory to that endorsed by the court in *Honeywell*. The new view is that any violation of the allocation of competences, however small and procedural and even if it is not manifest and it does not concern constitutional essentials, may be ‘structurally significant’. This is because, as we have seen, the Court has stretched the idea of ‘constitutional identity’ beyond recognition, inflated the idea of a ‘right to vote’ to the idea of shares in sovereignty and created the novel and absurd construct of national ‘budgetary autonomy’.

These idiosyncratic principles, that are unknown in all other major European constitutions, are now seen, to be part of the ‘unamendable core’ of the German constitution and are held to be – at least implicitly –*more important* than Article 23 which creates an obligation to respect EU law. As the Court put it at par. 158:

[The principle of conferral] is integral to justifying the decrease in the level of democratic legitimation of the public authority exercised by the European Union; in Germany, this decrease in democratic legitimation not only affects objective tenets of the Constitution (Art. 20(1) and (2) GG) but also bears upon the citizens’ right to vote and their right to democracy (Art. 38(1) first sentence GG). For safeguarding the principle of democracy, it is thus imperative that the bases for the division of competences in the European Union be respected (par. 158).

This paragraph summarizes the new doctrines of the German Constitutional Court and its novel conclusion that even the simplest mistake by the EU on the allocation of competences is a serious violation of the German constitution.

It is important to add that the weakness and the novelty of the majority's doctrines were highlighted in the dissenting opinions of Justices Lübbe-Wolff and Gerhardt in the earlier 2014 *OMT* judgment. Unfortunately, their views did not persuade the current majority and neither Lübbe-Wolff nor Gerhardt continue to sit at the court, having reached the end of their respective terms. More recently three judges dissented from the equally Eurosceptic judgment of the German Court in the Unified Patent Court Case in February 2020. Sadly, only one judge voted against the majority in Weiss, where the votes were 7 to 1. However, the sole dissenting voice did not find the time or the courage to compose a separate opinion. But judges should not hide in such circumstances.

Conclusion

If I am right this is not a singular judgment. It has its origins in some truly idiosyncratic doctrines about democracy pursued by the Court (as I also observed a few years ago when these doctrines first emerged). *Weiss* may be the prelude to further rejections of Germany's duties to the European Union by the German Court because of a new inwardness based on these theories. It would thus be wrong for the other member states to believe that the problem will soon go away. It will not go away as long as the German court maintains its peculiar inwardness and as long as it remains outside the European constitutional mainstream. What is truly inexplicable is the lack of attention the Court pays to Article 23 of the German Basic Law and its failure to see that transnational cooperation does not compromise sovereignty or democracy. How is it possible to describe Germany's 'constitutional identity' without including Article 23?

So there is no alternative, in my view. The European Commission ought to launch infringement proceedings before the Court of Justice for Germany's failure to comply with its duties under EU law. This process will hopefully concentrate minds in the German legal world. It may be an opportunity for legal scholarship to discuss openly the illegitimacy as well as the insularity of the Constitutional Court's ideas. Scholars may be able to persuade the Court that its novel doctrines are paradoxical and false and that it should return to the openness of *Lisbon* and *Honeywell*. But no outside action by the EU or the Court of Justice can solve this problem. This crisis lies deep into the German Constitutional Court's misguided doctrinal arguments.
